



**Below is a Memorandum Decision of  
the Court.**

Mary Jo Heston

## Mary Jo Heston U.S. Bankruptcy Judge

(Dated as of Entered on Docket date above)

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA**

In re:

CLARENCE G. MUNCE,

**Debtor.**

Case No. 13-45569

**MEMORANDUM DECISION  
(Not for Publication)**

This matter came for hearing before the Court on September 28, 2017, on the Trustee's Final Report. Creditors Kristy Rickey, Kelley Cavar, and the Estate of Gerald Munce (Creditors) filed an objection to the request for compensation by the Chapter 7 Trustee (Trustee) in accordance with 11 U.S.C. § 326.<sup>1</sup> The Trustee and the attorney for the Creditors appeared at the hearing. The Court requested additional pleadings be filed by the Trustee by close of business on September 28, 2017, and the Creditors by October 2, 2017. The Court took the matter under advisement. Based on the pleadings and arguments presented, the Court's findings of fact and conclusions of law are as follows.

<sup>1</sup> Unless otherwise indicated, all chapter, section and rule references are to the Federal Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1        This case has a long procedural history that spans several forums. On June 21, 2008,  
2 Clarence Munce (Debtor), who suffered from the early stages of dementia, killed his son Gerald  
3 Munce. Gerald's daughters, Kelley Cava and Kristy Rickey, are the co-executors of the Estate  
4 of Gerald Munce. That same year, the Debtor was charged with first degree homicide. On  
5 December 30, 2008, the Debtor was found incompetent to stand trial and the criminal charges  
6 were dismissed.

7        On July 11, 2008, the Creditors filed claims against the Debtor in Pierce County Superior  
8 Court under Washington State's wrongful death and survival statutes (Superior Court Action).  
9 Judgment was entered against the Debtor in the total amount of \$2,048,975.94, on August 8,  
10 2013 (Judgment). The Debtor appealed.

11       The Debtor filed bankruptcy under chapter 7, title 11 on August 29, 2013. On October  
12 1, 2013, the Washington State Court of Appeals stayed the appellate action pending the  
13 bankruptcy proceeding. The Debtor died on October 4, 2013. The Debtor's discharge was  
14 entered on December 10, 2013.

16       On October 10, 2013, the Trustee objected to the Debtor's exemptions. On that same  
17 date, the Trustee filed an application for a Fed. R. Bankr. P. 2004 examination of Dennis Cline,  
18 the Debtor's nephew and attorney in fact. An order granting this request was entered on  
19 October 11, 2013.

20       An order authorizing the employment of Orlandini & Waldron, P.S. as attorney for the  
21 bankruptcy estate (Estate) was entered on October 15, 2013.

22       The § 341 meeting of creditors was held on October 7, 2013, and on October 29, 2013,  
23 a notice to file proofs of claim was entered, setting a bar date of January 28, 2014.

1 On November 15, 2013, the Creditors filed a motion for relief from stay to pursue their  
2 claims against the Debtor to the extent of any insurance proceeds that were not part of the  
3 Estate. Initially, the Debtor submitted an agreed order on relief from stay, which was later  
4 vacated. An order granting limited relief from stay was subsequently entered on January 10,  
5 2014.

6 On December 5, 2013, the Debtor filed a motion to allow an exemption of \$214,603.56  
7 as exempt retirement funds. On December 12, 2013, an order was entered granting the  
8 Trustee's application to employ a certified public accountant. The Trustee objected to the  
9 Debtor's motion to allow exemption, and following several hearings, the Trustee filed a motion  
10 to approve a compromise between the Debtor and the Trustee on the exemption issue. Under  
11 the terms of the compromise, the Debtor's exemptions would be approved in the amount of  
12 \$133,671, of which \$83,580 was Labor & Industries (L&I) disability funds, to be disbursed to the  
13 Debtor's probate proceeding. The Creditors never objected to the Debtor's motion to allow  
14 exemption, but objected to the Trustee's motion to approve a compromise, arguing that none of  
15 the L&I proceeds were exempt. At a hearing held May 15, 2014, the Court<sup>2</sup> denied the Trustee's  
16 motion to approve the compromise, but also ruled that the Creditor's objection to the L&I funds  
17 exemption was untimely. The Court continued the matter to May 29, 2014, for further briefing  
18 on the Trustee's objection to the Debtor's exemption in the L&I funds. On May 29, 2014, the  
19 Court entered an order denying the Debtor's exemption in the L&I funds. On July 9, 2014, an  
20 order was entered allowing the Debtor's exemption in social security deposits and Teamsters  
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25 <sup>2</sup> Use of the term "Court" refers to both the current judge, Judge Mary Jo Heston, and the judge who presided over  
the Debtor's bankruptcy case through December 31, 2016, Judge Paul B. Snyder.

1 pension deposits in the total amount of \$50,091, to be turned over to the personal representative  
2 of the Debtor's probate estate.

3 On September 18, 2014, the Trustee filed an application to approve interim fees for the  
4 Trustee's attorney in the amount of \$25,760 for services rendered to the Estate from the date  
5 of filing to September 18, 2014. No objections were filed, and an order was entered approving  
6 the application on October 21, 2014.

7 On November 5, 2013, the Creditors filed Proof of Claim No. 1 in the amount of  
8 \$2,048,975.94 based on the Superior Court Judgment. On October 27, 2015, the Washington  
9 State Court of Appeals reversed the Judgment and remanded it back to Superior Court to  
10 determine damages. Due to the reversal, the Trustee applied for and obtained an order  
11 authorizing the employment of Michael McKasy as a consultant and expert for the Estate to  
12 value the wrongful death proof of claim filed by the Creditors. According to the application,  
13 because of "such reversal, and other competing interests in this proceeding, the Trustee  
14 believes this now unliquidated claim will require this Court to determine the amount of the claim  
15 for purposes of this bankruptcy." Appl. to Employ 2:4-6, ECF No. 170. The application was  
16 approved on November 25, 2015. The Trustee further filed an objection to the Creditors' claim  
17 on December 1, 2015. Both the Debtor and Creditors filed a response. The Court ruled at the  
18 January 7, 2016 hearing that the bankruptcy court lacked jurisdiction to determine the amount  
19 of the Creditors' claim. On the Debtor's motion, a supplemental order was entered on January  
20 28, 2016, modifying the stay order previously entered at ECF No. 61, to allow the matter to  
21 proceed on a determination of damages in Superior Court and thereby liquidate the Creditors'  
22 claim. The Trustee, and the Debtor's and Creditors' counsel signed off on this order. Suppl.  
23 Order Modifying Stay, ECF No. 184.  
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1 On February 24, 2016, the Trustee filed an application to approve the interim fees for  
2 expert witness McKasy. An application to approve the interim fees of the Trustee's CPA was  
3 filed on March 1, 2016. Both applications were approved without objection on April 1, 2016. An  
4 application to approve compensation of special counsel Andrews & Arbenz, PLLC was filed on  
5 March 15, 2016, and approved without objection on April 26, 2016.

6 On July 13, 2016, the Creditors moved for an order requiring the Trustee to release any  
7 information gathered by his CPA or the personal injury valuation consultant, McKasy. The  
8 Creditors also requested that the Court order mediation of this matter. At the hearing held on  
9 July 28, 2016, counsel for the Creditors<sup>3</sup> represented to the Court that the Trustee had turned  
10 over some of the documents requested, and he asked that the Court set over the motion to a  
11 later date. With respect to the mediation issue, the Court agreed that it could not force parties  
12 into mediation without their consent. The Court ruled that the Creditors should file a new motion  
13 specifying what information they still sought and addressing the mediation concerns. On August  
14 1, 2016, the Court entered an order denying the Creditors' motion without prejudice. There is  
15 no record of any additional motion filed by the Creditors seeking information from the Trustee.  
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17 On September 9, 2016, the Trustee filed a motion to clarify the lift of stay order entered  
18 at ECF No. 184. Trial was scheduled in Superior Court for November 2016, and an "issue arose  
19 as to whether the Superior Court had clear authority to determine damages and if so, would  
20 such determination become the then allowed bankruptcy claim amount for Claim #1." Mot. to  
21 Clarify 2:11-13, ECF No. 214. An Order Clarifying Lift of Stay and Order Allowing Claim #1 was  
22 entered without objection on October 4, 2016, confirming that the Creditors' claim would be  
23 allowed in the amount as determined in the Superior Court Action.  
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<sup>3</sup> Mr. Shillito appeared for the Creditors in the absence of Mr. Barcus.

1           The Trustee filed a second application for interim attorney's fees (Second Application)  
2 on November 2, 2016, seeking approval of \$12,950 for services rendered from September 19,  
3 2014, through October 31, 2016. The Creditors objected, arguing that the Trustee had "willfully  
4 failed to diligently fulfill his statutory and fiduciary duties to expeditiously close the bankruptcy  
5 estate." Obj. 4:16-17, ECF No. 224. The Creditors further alleged that the Trustee failed to  
6 investigate and pursue reasonably available claims, including potential malpractice claims  
7 against one or more of the attorneys representing the Debtor in the Superior Court Action and  
8 fees paid by the Debtor for the services of a litigation guardian ad litem.

9           The Court orally granted the application at the December 15, 2016 hearing. The Court  
10 subsequently entered an Order Granting Second Application for Payment of Interim Attorney's  
11 Fees on December 20, 2016. See ECF No. 229. In this Order, the Court indicates that the  
12 purpose was to "further review this matter" and prepare an "order incorporating its decision with  
13 additional findings." Order Approving 2nd Appl. 2:1-2, ECF No. 229. The Court concluded that  
14 none of the multiple objections raised by the Creditors to the Second Application warranted a  
15 denial or reduction of the interim fees sought: "[I]t would appear that any alleged delay in this  
16 case is the result of the reversal of the judgment in the Creditors' favor by the Washington State  
17 Court of Appeals and continuance of the Pierce County Superior Court (State Court) jury trial  
18 by the Creditors that had been scheduled for November 29, 2016." Order Approving 2nd Appl.  
19 2:13-17, ECF No. 229. The Court further indicated that the Creditors' complaints that the  
20 Trustee was not performing his statutory duties were not presently before the Court, nor had  
21 any evidence been provided to substantiate such allegations. The Court indicated that such  
22 concerns could be raised when the Trustee requests his statutory fee or by the Creditors  
23 properly noting these matters for hearing. The Creditors never filed such a motion.  
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1           On February 24, 2017, the Trustee and Creditors filed a stipulation assigning this matter  
2 for mediation. This mediation was once again unsuccessful and the matter went to trial in  
3 Superior Court.

4           On June 15, 2017, the Trustee filed a motion to modify and allow Claim No. 1, based on  
5 the fact that the jury found in favor of the Creditors and awarded \$3,000,000 in damages. The  
6 Trustee sought to allow Claim No. 1 in the total amount of \$3,010,748.19, which includes the  
7 \$3,000,000 in damages plus a cost bill of \$10,748.19. An order allowing Claim No. 1 in this  
8 amount was entered on July 11, 2017.

9           On August 29, 2017, the Trustee filed his Final Report, listing gross receipts of  
10 \$624,879.91 and a balance on hand of \$463,107.33. The Final Report provides that pursuant  
11 to § 326(a), the maximum compensation allowable to the Trustee is \$31,989.45, the Trustee  
12 has received no interim compensation, and the Trustee seeks compensation in the amount of  
13 \$31,989.45 and reimbursement for expenses of \$803.41. The Final Report further lists the  
14 remaining balance of \$430,314.44 to be paid pro rata to timely allowed general unsecured  
15 claims, of which the Creditors will receive \$428,805.02. The Creditors object to the Trustee's  
16 Final Report. At the September 28, 2017 hearing, the Creditors acknowledged that the  
17 Trustee's commission is the sole matter at issue.

19           In the Ninth Circuit, a trustee's commission calculated under § 326 is "presumed  
20 reasonable" except in exceptional circumstances. Fear v. United States Trustee (In re Ruiz),  
21 541 B.R. 892, 896 (9th Cir. BAP 2015). This limited inquiry is justified by the view that the  
22 statutory amount allowed to the trustee is a commission, instead of a standard fee amount  
23 subject to the lodestar analysis. Hopkins v. Asset Acceptance LLC (In re Salgado-Nava), 473  
24 B.R. 911, 920-21 (9th Cir. BAP 2012); § 330(a)(7). "[W]e know of no reason why courts should

1 second-guess Congress's clearly expressed intent to fix trustee commission rates for the vast  
2 majority of cases," and "absent extraordinary circumstances, bankruptcy courts should approve  
3 chapter 7, 12 and 13 trustee fees without any significant additional review." Salgado-Nava, 473  
4 B.R. at 920-21. Although not well defined, the "extraordinary circumstances" potentially  
5 justifying a reduction in commission are those few instances where the trustee's case  
6 administration "falls below acceptable standards or where it appears a trustee has delegated a  
7 substantial portion of his or her duties to an attorney or other professional." In re Rowe, 750  
8 F.3d 392, 397 (4th Cir. 2014) (quoting 2 U.S. Trustee, Handbook for Chapter 7 Trustees Ch. 2-  
9 1, at 39 (Apr. 2012)).

10 The Creditors object to the Trustee's commission, contending that the Trustee failed to  
11 perform his duties in accordance with § 704(a)(1), (4), and (7), provided in relevant part as  
12 follows:

13 (1) close such estate as expeditiously as is compatible with the best  
14 interests of parties in interest;

15 (4) investigate the financial affairs of the debtor; [and]

16 (7) unless the court orders otherwise, furnish such information concerning  
17 the estate and the estate's administration as is requested by a party in interest.

18 The Creditors argue that because the Trustee breached his fiduciary duties, a denial or  
19 reduction of the commission is warranted. Specifically, the Creditors argue that the Trustee  
20 breached his duties in not acting expeditiously, failing to pursue assets, and failing to provide  
21 information.<sup>4</sup>

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25 <sup>4</sup> Although the Creditors also appeared to take issue with the fees paid to Trustee's counsel in their pleadings, they  
clarified at the September 28, 2017 hearing that such fees are only being mentioned for purposes of examining  
the total fees paid in this case. Thus, the only compensation being challenged is that of the Trustee.

Initially, the Creditors have made generalized allegations that the Trustee could have acted more quickly to close this case. There is no evidence, however, that any delay in this case was the fault of the Trustee. The Creditors hold the primary claim in this case, and the damage award was overturned on appeal while the bankruptcy case was pending. At that point, the claim became unliquidated and the Trustee immediately took steps to move the case forward, including seeking court approval of a consultant (McKasy) to evaluate the claim and objecting to the claim as originally filed. This Court determined that it lacked jurisdiction to determine the claim and subsequently entered an order modifying the stay to allow the case to proceed to trial in Superior Court. The verdict and damage award were not rendered until June 2017, after which the Trustee immediately moved to allow the Creditors' claim and then approve his final report. The closing of the case was therefore entirely dependent upon the Superior Court Action, and the Creditors' allegation that any delay was the fault of the Trustee is unfounded.

The Creditors also argue that the Trustee should have been more active in attempting to settle the matter earlier. This allegation also has no basis. This case involved a three-party dispute, and the Trustee had no ability to force the other parties to settle. The record demonstrates that multiple settlement attempts were made, including three failed mediations. Unable to reach a global settlement, the parties were required to proceed to trial in Superior Court in order to determine the claim. The Creditors have failed to demonstrate that any delay in this case was attributable to the Trustee, and there is no evidence that he breached his duty under § 704(a)(1) to close this case as expeditiously as possible.

The Creditors further contend that the Trustee failed to investigate potential malpractice claims or pursue the recovery of fees paid by the Debtor for litigation services of a guardian ad

1 item. These are the same allegations raised by the Creditors to the Trustee's Second  
2 Application for Interim Fees, and once again, the Court concludes that the Creditors have failed  
3 to provide any evidence that the Trustee's determination not to pursue such assets was in error.

4 See Order Approving 2nd Appl. 3:3-11, ECF No. 229. The Ninth Circuit Court of Appeals (Ninth  
5 Circuit) has concluded that a bankruptcy trustee is afforded substantial discretion in performing  
6 his duties, so long as he exercises a "measure of care and diligence that an ordinary person  
7 would exercise under similar circumstances." United States ex rel. Block v. Aldrich (In re  
8 Rigden), 795 F.2d 727, 730 (9th Cir. 1986). This includes "business judgment" discretion to  
9 pursue only those claims that are in the best interest of the estate. See In re Smith, 426 B.R.  
10 435, 441 (E.D. N.Y. 2010), aff'd, 645 F.3d 186 (2nd Cir. 2011). See also In re Marshall, No.  
11 2:14-bk-16359-TD, 2015 WL 5735220, at \*4 (Bankr. C.D. Cal. Sept. 29, 2015) (bankruptcy court  
12 rejected argument that the chapter 7 trustee breached his fiduciary duty when, exercising his  
13 business judgment, he decided not to participate in an appeal).

14 In regards to the alleged malpractice claims, the Trustee has stated that he thoroughly  
15 reviewed these claims and determined in his business judgment that they were not worth  
16 pursuing. Not only did these claims arise prepetition, but based on the Trustee's evaluation,  
17 they also arose outside of the periods for seeking to void the transactions under the Bankruptcy  
18 Code and were subject to various valid defenses. In addition, contrary to the Creditors'  
19 allegations, the Trustee has provided evidence that the Superior Court did provide oversight of  
20 the pre-petition fees and expenditures in the guardianship proceedings. See Trustee's Suppl.  
21 Resp. Exs. 4-5, ECF No. 249. The Creditors were involved in these proceedings, which  
22 predated the Trustee, and there is no evidence that the Creditors made any challenges to the  
23 expenditures when reported or approved. More importantly, the Trustee also has provided  
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1 evidence that he consulted with two legal malpractice attorneys in early 2014 and that "neither  
2 attorney opined that a viable claim for malpractice existed based upon the legal representation  
3 of Clarence Munce." Trustee's 2nd Suppl. Resp. 2:1-3, ECF No. 253. The Creditors have failed  
4 to present any evidence that the Trustee's decision not to pursue these claims was in error.

5 The same is true of the Trustee's decision not to pursue reimbursement of the litigation  
6 guardian ad litem fees from State Farm Insurance Company (State Farm). The Trustee did  
7 make demand from State Farm, which was denied, and then made attempts to employ special  
8 counsel to pursue this claim on a contingent fee basis, without success. The Trustee detailed  
9 his efforts to pursue this claim at length in his response. See ECF No. 247. The Trustee  
10 contacted four different attorneys to evaluate this claim and not one of them was willing to  
11 pursue it. Attorney Daniel Kyler even provided a written opinion letter, stating that it was his  
12 "opinion and recommendation that a claim not be pursued against State Farm." Trustee's Resp.  
13 Ex. 5, ECF No. 247. The Creditors' claim that the Trustee failed to investigate this claim and  
14 that "in excess of \$50,000.00 could be recovered for the Estate based on very little work and  
15 little or no risk" is unsupported. Creditors' Obj. 8:6-7, ECF No. 245.

16 The Creditors also contend that the Trustee acted in collusion with Debtor's counsel in  
17 attempting to "aid the debtor" in exempting \$167,000 in paid L&I disability funds, even though  
18 the Court ruled on May 29, 2014, that only \$50,091 could be exempted. Creditors' Obj. 5:15-  
19 16, ECF No. 245. The pleadings in the record, however, reflect that in February 2014, the  
20 Trustee filed memoranda and declarations in opposition to the Debtor's Motion to Allow  
21 Exemption. See ECF Nos. 65, 66, 73, 74. Moreover, the Trustee represented in open court  
22 that while he initially understood that the funds could be exempt, additional discovery through  
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1 an employed accountant led to evidence that the L&I funds were not exempt under Washington  
2 State law. The Creditors have not presented any evidence to support their allegation.  
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4 The Creditors further contend that \$6,032 paid to attorney McKasy to appraise the value  
5 of their state court claim was a waste of bankruptcy funds in light of the Court's determination  
6 that the Court lacked authority to estimate the claim. Creditors' Obj. 5:9-11, ECF No. 245. As  
7 such, they argue that the Trustee's compensation should be reduced by this amount. As stated  
8 prior, however, it was entirely proper for the Trustee to move forward with determining this claim  
9 after the damage award was reversed on appeal. On November 25, 2015, the Court approved  
10 McKasy's employment, without objection, for purposes of reviewing the value of the wrongful  
11 death judgment and proof of claim filed by the Creditors. Although the Court later determined  
12 that pursuant to 28 U.S.C. § 157(b)(2)(B), it did not have jurisdiction to estimate the claim, there  
13 is no evidence that it was improper for the Trustee to retain McKasy's services. The Trustee's  
14 actions actually moved the case forward so that the proper forum for liquidating this claim was  
15 quickly determined. Soon after the order was entered allowing the matter to proceed in Superior  
16 Court, the Trustee moved for approval of McKasy's compensation in the amount of \$6,032, for  
17 services provided through January 13, 2016. The Declaration of McKasy attached to the  
18 Declaration of Ben Barcus, Ex 4 of ECF No. 246, and the time records filed in support of the  
19 application for compensation, ECF No. 185, establish that the only services performed after the  
20 Court's ruling on January 7, 2016, were 2 hours working on the report and the declaration of  
21 time. On April 1, 2016, again without objection by the Creditors or any other entity, the Court  
22 reviewed the application and approved the requested fees. There is no basis in law or fact to  
23 support the Creditors' request to reduce the Trustee's compensation by the \$6,032 paid to  
24 McKasy.  
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1           Finally, the Creditors allege that the Trustee breached his duty to provide them with  
2 requested information, specifically McKasy's valuation and any documents prepared by the  
3 Trustee's CPA. These allegations are also spurious.

4           The Trustee is required, unless otherwise ordered by the Court, to "furnish such  
5 information concerning the estate and the estate's administration as is requested by a party in  
6 interest . . ." § 704(a)(7). This provision does not require the Trustee to disclose all information  
7 to every creditor, especially a party actively litigating against the estate. 6 Collier on Bankruptcy  
8 ¶ 704.10 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2017). A trustee is also not  
9 required to furnish information protected by the attorney-client privilege. See In re Lee Way  
10 Holding Co., 120 B.R. 881, 907 (Bankr. S.D. Ohio 1990).

11          In regards to McKasy's valuation, the Creditors have failed to establish that the Trustee  
12 was under any obligation to provide this information to them or that the report would have  
13 somehow rendered the state court trial unnecessary. The Trustee sought employment of  
14 McKasy after the Washington State Court of Appeals overturned the Creditors' judgment and  
15 in preparation for further proceedings to liquidate the claims. Appl. to Employ, ECF No. 170.  
16 When the Creditors demanded disclosure of the McKasy valuation, Creditors' counsel  
17 conceded at the hearing that the Trustee had provided some information. Denying the motion  
18 without prejudice, the Court directed the Creditors to file a new motion specifying the information  
19 they still sought. No such motion was ever filed. Additionally, the Trustee indicated that he  
20 eventually provided the McKasy valuation voluntarily. Similarly, the Trustee stated on the  
21 record that he gave the Creditors everything provided by the CPA, and the Court has no reason  
22 to believe that this is not accurate. Based on the evidence before the Court, the Trustee has  
23 fulfilled his duty under § 704(a)(7).  
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1 It is undeniable that the basis for the Creditors' claim is tragic, and the relationship among  
2 all parties involved—at both the state and federal level—has been extremely acrimonious. While  
3 settlement of these claims likely would have resulted in a less expensive and quicker resolution,  
4 settlement was in fact attempted but unsuccessful on multiple occasions, through no fault of the  
5 Trustee. This case has been pending for years, and the Trustee has expended significant effort  
6 and time in fulfilling his statutory duties. The Trustee has liquidated assets totaling \$624,879.91,  
7 and the Bankruptcy Code entitles him to a commission of \$31,989.45. At the same time, the  
8 Creditors will be receiving \$428,805.02 of the \$430,314.47 available for distribution, which is an  
9 anticipated dividend of 14.2 percent. The fact that the Creditors will not be paid in full or are  
10 dissatisfied with the result is not the standard to deny the Trustee his statutory commission.  
11 Rather, the Creditors are required to establish "extraordinary circumstances" that would warrant  
12 overcoming the presumption that the Trustee's statutory fee is valid. The Creditors have failed  
13 to meet their burden, and the Court will enter an order approving the Trustee's Final Report.  
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